Supreme Court, U.S.
FILED
NOV 25 2002
OFFICE OF THE CLERK

(4)

No. 02-253

In the Supreme Court of the United States

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO,
Petitioner,

v.

THERESA M. SILER-KHODR,
Respondent,

AND

THE UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER SEX DISCRIMINATION LEGISLATION IS EXEMPT FROM THE COURT'S STANDARD §5 ANALYSIS.

Dr. Siler-Khodr incorrectly argues that there is no circuit split presented for the Court's review regarding the circuit courts' application of the §5 analysis to the EPA because the cases evidencing the conflicting §5 analysis were decided under the FMLA. She then observes that the EPA may affect a valid abrogation of the states' Eleventh Amendment immunity even if other statutes, like the FMLA, do not. Resp., at 12-13.

Dr. Siler-Khodr misses the point. The University does not contend that there is a circuit split regarding the §5 analysis of the EPA *simply because* there is a circuit split regarding the validity of the FMLA abrogation. Rather, this split evidences the circuit courts' inconsistent application of the §5 analysis in sex-discrimination legislation. The point the University is making is that the two statutes should not be treated differently. The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have stuck down the FMLA abrogation because Congress failed to make specific findings of wide-spread unconstitutional sex discrimination by the states, while the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have upheld the EPA, excusing the lack of any specific findings by simply citing to an unspecified historical record of sex discrimination.[1] The split of authority demonstrates

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1. For cases striking down the FMLA abrogation, see *Laro v. New Hampshire*, 259 F.3d 1 (CA1 2001); *Lizzi v. Alexander*, 255 F.3d 128 (CA4 2001), *cert. denied*, 122 S.Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094 (CA8 2000); *Chittister v. Dep't of Cmty. Econ. Dev.*, 226 F.3d 223 (CA3 2000); *Kazmier v. Widmann*, 225 F.3d 519 (CA5 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (CA6 2000); *Hale v. Mann*, 219 F.3d 61 (CA2 2000); *Garrett v. Univ. of Ala. Bd. of Tr.*, 193 F.3d 1214 (CA11 1999), *rev'd on other grounds*, 531 U.S. 356 (2001). For cases upholding the EPA abrogation, see *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265

the untenable situation of the alleged EPA abrogation being upheld based on the "mere specter of sex discrimination,"[2] while, at the same time, the FMLA abrogation is struck down because Congress failed to make specific findings of sex-discrimination by the states. Thus, in the area of sex discrimination legislation, the circuits are in disarray concerning the application of the Court's well-established §5 abrogation analysis.

Because of the importance of the states' Eleventh Amendment immunity to our system of federalism, the Court should grant the University's petition to resolve the question whether the EPA is a valid abrogation of that immunity. Alternatively, the Court should hold the petition pending its resolution of *Hibbs v. Department of Human Resources*, 273 F.3d 844 (CA 9 2001), *cert. granted*, 122 S.Ct. 2618 (2002), because the Court's resolution of the abrogation issue under the FMLA may be determinative of the question presented in this case.

II. No Obstacles Impede the Court's Review of the Questions Presented.

Dr. Siler-Khodr incorrectly contends that the Court cannot reach the Eleventh Amendment immunity questions presented without first determining whether the University has waived its immunity. Citing *Lapides v. Board of Regents*, 122 S.Ct. 1640 (2002), she argues that the University waived its immunity by removing this case to federal court and litigating the case on the merits. Resp., at 7-8.

F.3d 541 (CA7 2001); *Varner v. Ill. State Univ.*, 226 F.3d 927 (CA7 2000), *cert. denied*, 522 U.S. 902 (2001); *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (CA6 2000); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272 (CA11 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965 (CA8 1999); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833 (CA6 1997).

2. *Kazmier*, 225 F.3d, at 526.

Dr. Siler-Khodr has waived this argument. She did not invoke, much less argue, waiver in response to the University's initial assertion of its Eleventh Amendment immunity in the court of appeals. Her argument that the University waived its Eleventh Amendment immunity by removal is being raised for the first time in this Court.

Unlike the defense of sovereign immunity—which is jurisdictional and may be raised at any time—the claim that the University waived its Eleventh Amendment immunity is an argument that must be raised in a timely fashion. Because Dr. Siler-Khodr failed to raise her waiver argument in the court of appeals, any waiver by the University has itself been waived, and the University's Eleventh Amendment immunity remains intact. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 331-32 (CA5 2002); *Martinez v. Tex. Dep't of Criminal Justice*, 300 F.3d 567, 574-75 (CA5 2002); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (CADC 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). Stated simply, Dr. Siler-Khodr has waived the waiver, if any.[3]

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3. Even had Dr. Siler-Khodr preserved the waiver issue, the University still maintains its sovereign immunity. *Lapides* establishes that removal would have waived the University's Eleventh Amendment immunity as to any state-law claims for which its immunity had been waived in state court, but not as to Dr. Siler-Khodr's EPA claim—to which the state did not consent in state court and for which Congress has not effectively abrogated the states' immunity. In *Lapides*, the Court specifically restricted its waiver-by-removal holding to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides*, 122 S.Ct., at 1643. The Court did not "address the scope of the waiver by removal in a situation where the State's underlying sovereign immunity has not been waived or abrogated in state court." *Id.* Therefore, there is no waiver by removal under *Lapides* as to Dr. Siler-Khodr's EPA claim, and the University's Eleventh Amendment immunity would remain intact for purposes of that claim.

Additionally, the Court should decline to consider Dr. Siler-Khodr's waiver argument because it introduces an argument that the lower court did not have the opportunity to pass upon. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Dr. Siler-Khodr could have made the waiver argument in her briefing to the Fifth Circuit. But she did not. Accordingly, the Court should follow its practice of not considering issues that were not "pressed or passed upon below" and decline to entertain Dr. Siler-Khodr's waiver argument. *Duigan v. United States*, 274 U.S. 195, 200 (1927); *see also, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

III. THE FIFTH CIRCUIT'S OPINION RUNS AFOUL OF THE COURT'S ELEVENTH AMENDMENT JURISPRUDENCE AND MERITS CONSIDERATION BY THE COURT.

A. The EPA Abrogation Is Invalid and Does Not Subject the States to Suit in Federal Court.

The Court has held, in no uncertain terms, that Congress has no authority to subject the states to suit under its Commerce Clause power, but may only do so by enacting appropriate legislation under §5 of the Fourteenth Amendment. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996). Because Congress enacted and applied the EPA to the states under the Commerce Clause, Congress's attempted abrogation of the states' Eleventh Amendment immunity is invalid.

Despite the Court's clear directive that Congress may not rely on the Commerce Clause as authority for abrogating the states' Eleventh Amendment immunity, or perhaps because of that directive, the United States insists that the EPA abrogation can be upheld as a valid exercise of Congress's §5 power under the general proposition that Congress is not required to specify the source of its

power when enacting legislation. U.S. Resp., at 5-9 (citing *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983)). Thus, the United States is arguing that the Court should uphold the EPA abrogation as proper §5 legislation because Congress *could have* passed the EPA under its §5 power, even though it did not.

The United States' position is flawed for two reasons. *First*, although Congress need not explicitly invoke §5 in the text of a statute, there still must be at least some indication that Congress sought to use its §5 power. *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 292 F.3d 221, 223 (CA5 2002) (Smith, J., dissenting from denial of petition for panel rehearing). As the Court noted in *Raygor v. Regents of the University of Minnesota*, "[w]hen Congress intends to alter the usual balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" to ensure that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" of an important question of constitutional law. 534 U.S. 533, 543-44 (2002). *See also Fla. Prepaid*, 527 U.S., at 642 n.7 (refusing to consider the Just Compensation Clause as justification for the attempted abrogation because Congress had expressly identified the powers it believed itself to be acting under—the Commerce Clause and §5 of the Fourteenth Amendment—and because "[t]here [wa]s no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute that Congress" intended to implement its Just Compensation Clause power). Because Congress gave no indication in 1974 that it was applying the EPA to the states under its §5 power, the Court should not lightly "attribute to Congress an intent to intrude on state governmental functions" under that power. *Raygor*, 534 U.S., at 546 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)).

Second, the United States' suggestion that the EPA abrogation can be upheld as valid §5 legislation should be rejected because Congress plainly identified the Commerce Clause as the purported

source of its power to abrogate the states' Eleventh Amendment immunity. *See* H.R. REP. NO. 93-913, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2811-12. The 1974 House and Senate Reports confirm that in applying the EPA to the states, Congress intended to act solely under its Commerce Clause power. The fact that it is now clear that Congress had no power to do so should not send the Court "rummag[ing] through the Constitution" in search of a power that may support Congress's action after the fact. *Timmer*, 104 F.3d, at 846 (Boggs, J., dissenting in part).[4] The Court should not "rewrite the statutory scheme in order to approximate what Congress might have wanted had it known that [applying the EPA to the States under its Commerce Clause power] was beyond its authority." *Seminole Tribe*, 517 U.S., at 76.

B. Assuming, *Arguendo*, That the EPA May Be Viewed as §5 Legislation, It Is Nonetheless Infirm Because It Erects a Standard That Exceeds the Protection Afforded by the Constitution, and It Was Applied to the States With No Supporting Congressional Findings of Widespread Unconstitutional Behavior by the States.

The EPA abrogation cannot withstand the Court's §5 congruence-and-proportionality test. The statute drastically alters the applicable equal-protection standard by allowing a finding of discrimination against the states in the absence of any evidence of intent to discriminate. And Congress subjected the states to this heightened standard without first making the requisite findings of widespread and persistent unconstitutional state action to support that measure. Thus, a straight-forward application of the §5 test demands the EPA abrogation be stricken.

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4. Justice Boggs dissented in part from the majority in *Timmer* because he, like Justices Smith and DeMoss in this case, believed that Congress applied the EPA to the states under its Commerce Clause power, not §5. *Timmer*, 104 F.3d, at 845-47; *Siler-Khodr*, 292 F.3d, at 222-24.

The United States attempts to justify Congress's attempt to subject the states to suit under the EPA by arguing that our nation's history of sex discrimination—as noted in *United States v. Virginia*, 518 U.S. 515 (1996)—can substitute for the required congressional findings of a "pattern of unconstitutional discrimination on which §5 legislation must be based." *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001); U.S. Resp., at 12-15. The Court, however, has never suggested that historical discrimination *in general* will permit the abrogation of the states' Eleventh Amendment immunity. Even in cases dealing with race discrimination, the Court has unfailingly applied its §5 analysis, with no leniency offered as to the findings requirement. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 328-31 (1966).

Moreover, the United States' reference to *testimony* heard by Congress in the years before the application of the EPA to the states cannot substitute for congressional *findings* of widespread intentional sex discrimination by the states. U.S. Resp., at 15-25. The vast majority of the testimony cited by the United States was not about extending the EPA to the states, but instead, dealt with other bills and was heard in different legislative sessions by different members of Congress. Further, the scant evidence of sex discrimination by states that was heard in connection with the 1974 extension of the EPA to the states is insufficient to show a pattern of sex discrimination by the states. Rather, the evidence "consists almost entirely of isolated sentences clipped from" legislative hearings and reports. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000).

For the purposes of justifying the abrogation of the states' Eleventh Amendment immunity under the EPA, this scant and remote testimony will not suffice. There is absolutely no evidence that in 1974 the states were engaging in such rampant and widespread unconstitutional sex discrimination that the application of the EPA, which redefines the contours of the Constitution to

prohibit state action in the absence of any evidence of intentional discrimination, was necessary.

The remedy provided by the EPA is, therefore, incongruent and out of proportion to the supposed harm it was designed to prevent. This congressional expansion of rights is substantive in operation and effect and constitutes an invalid attempt by Congress to abrogate the states' Eleventh Amendment immunity.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 25, 2002